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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 425

SEABOARD AIR LINE RAILROAD COMPANY, ATLANTIC COAST LINE RAILWAY COMPANY, et al., *Appellants*

v.

UNITED STATES OF AMERICA, FLORIDA EAST COAST RAILWAY COMPANY, et al., *Appellees*

No. 555

INTERSTATE COMMERCE COMMISSION, *Appellant*

v.

FLORIDA EAST COAST RAILWAY COMPANY, et al., *Appellee*

On Appeal from the United States District Court for the Middle District of Florida

MOTION TO DISMISS OR AFFIRM

W. GRAHAM CLAYTOR, JR.
Box 1808
Washington 13, D. C.

JOHN K. MALLORY, JR.
ROLAND S. HOMET, JR.
224 Southern Building
Washington 5, D. C.

Attorneys for Appellee Southern Railway Co. et al.

Of Counsel:

WILLIAM D. MCLEAN
Washington, D. C.

JOHN B. MILLER
Savannah, Ga.

October, 1965

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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MOTION TO DISMISS OR AFFIRM

On Behalf of Appellee Southern Railway Company et al.

Appellee Southern Railway Company and its affiliated companies comprising Southern Railway Sys-

tem,* hereinafter referred to collectively as "Southern," hereby move pursuant to Rule 16 of the Revised Rules of this Court:

(1) To dismiss that part of the appeal in No. 425 of Seaboard Airline Railroad Company, Atlantic Coast Line Railroad Company, Atlantic Coast Line Company, and Mercantile Safe Deposit and Trust Company denominated in their Jurisdictional Statement as Questions (a), (b), and (c) on the ground that these questions have not yet been passed on by the district court and so are not properly presented to the Court on this appeal.

(2) To affirm the limited and interim judgment below on the ground that it is so plainly correct as not to merit further argument.

QUESTION PRESENTED

The holding and conclusion of the court below is set forth on page 15 of its opinion (242 F. Supp. 14, 22) and presents the following question:

Was the district court correct in setting aside orders of the Interstate Commerce Commission approving the merger of the Seaboard Air Line and Atlantic Coast Line Railroads, without prejudice to further proceedings by the Commission, on the ground that the Com-

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*The Alabama Great Southern Railroad Company; The Cincinnati, New Orleans and Texas Pacific Railway Company; New Orleans and Northeastern Railroad Company; Georgia Southern and Florida Railway Company; Carolina and Northwestern Railway Company; Central of Georgia Railway Company; and Savannah & Atlanta Railway Company—all of whom appeared with Southern Railway Company as intervening plaintiffs in the court below.

mission had failed to make sufficient findings to accommodate the Interstate Commerce Act with Section 7 of the Clayton Act because the Commission failed to define the line of commerce and section of the country in which to appraise the probable competitive effects of the proposed merger and failed to determine whether the effect of the merger may be substantially to lessen competition or tend to create a monopoly?

STATEMENT

This is a direct appeal under 28 U.S.C. § 1253 from a judgment and decree entered on May 13, 1965 by a district court of three judges convened pursuant to 28 U.S.C. §§ 2321-2325, which set aside an order of the Interstate Commerce Commission without prejudice to further proceedings, findings and orders by the Commission. The appeal is brought by private parties and is joined in part by the Commission.

The proceedings originated with an application to the Interstate Commerce Commission under Section 5(2) of the Interstate Commerce Act (54 Stat. 905, 49 U.S.C. § 5(2)) to approve the merger of Atlantic Coast Line Railroad Company (ACL) into Seaboard Air Line Railroad Company (SAL) and the related acquisition of control by the merged company of affiliated lines most prominently including Louisville and Nashville Railroad Company (L & N). After hearings and a recommended report by a hearing examiner, the Commission issued a report and order dated December 2, 1963 approving the merger with certain specified conditions, in which the Commission stated as a conclusion that the reduction of competition caused by the merger would not be substantial. On March 4, 1964, the

Commission issued a further order refusing reconsideration.[1]

Appellee Florida East Coast Railway Company (FEC) brought this action in the United States District Court for the Middle District of Florida to set aside the Commission's orders on the ground, *inter alia,* that the Commission's conclusion on reduction of competition was not supported by adequate consideration of antitrust policy as required by controlling Supreme Court decisions. Southern Railway Company (Southern) and its affiliated companies, who had intervened in the Commission proceedings, were allowed to intervene as plaintiffs in the district court. The court (per Rives, C. J.) unanimously sustained the complaint on the ground of inadequate Commission findings and set aside the Commission's orders "without prejudice to further proceedings before and further findings and orders by the Commission . . . ."

The legality of the merger was attacked in the district court on various and far-reaching grounds, many of which were not reached by the court. The court took note of Commission findings that the merger of these essentially parallel lines would eliminate competition between SAL and ACL in a six-state Southeastern area; that the merged company would control more than 54% of the total rail mileage in the six-state area and, with the ACL's controlled affiliate the L & N, in an eight-state area; and that the merged company would have about 81% of the railway mileage in the State of Florida. Nevertheless the court refused a

[1] The report of the Interstate Commerce Commission is printed at 320 I.C.C. 122. The Commission's orders are set forth as Appendices B and C to the private appellants' Jurisdictional Statement.

request by the United States, aligned as a party plaintiff in this suit, to hold that the merger could not be sustained on any conceivable Commission findings or order. The court similarly declined to pass on Southern's request that the Commission be required to condition approval of the merger on divestiture of the L & N or on transfer by the merged company of a line of railroad into central and west-coast Florida. In addition, the court, because of its holding, did not reach the question whether there was evidence in the record to support the findings of the Commission. The court also specifically declined to rule on the adequacy of the Commission's railway-employee protective terms and conditions, challenged by intervening plaintiff Railway Labor Executives' Association, or on the legality of control over the merged company by intervening defendant Mercantile-Safe Deposit and Trust Company, stating in each case that decision of these questions "would be premature at this time."

ARGUMENT

1. Questions (a), (b) and (c) Sought to Be Presented by the Private Appellants Should Be Dismissed Because They Have Not Yet Been Passed On by the District Court.

The private appellants recognize that the district court has not yet dealt with many of the matters presented to it. Their Jurisdictional Statement, however, includes among its questions presented if probable jurisdiction is noted a request that:

> "In view of the full record on these matters and the manifest correctness of the Commission's rulings on them, despite the failure of the court below to pass on them, . . . the judgment below be reversed with instructions to dismiss the complaint, and the orders of the Commission be reinstated . . . ." (p. 5.)

In effect the private appellants expect this Court to sit as a court of first instance to review the administrative proceedings before the Commission. Their request, in which significantly appellant Interstate Commerce Commission does not join, seeks something that this Court has never done and should not do.

First, as a matter of *practice,* in cases coming from the Interstate Commerce Commission "it is the practice of this Court not to review an administrative record in the first instance . . . ." *United States* v. *Great Northern R. Co.,* 343 U.S. 562, 578 (1952). Cf. *Federal Communications Commission* v. *Allentown Broadcasting Corp.,* 349 U.S. 358, 365 (1955): "... [I]t is not our function to reinstate the determination of the Commission. That would make this Court the reviewing body of the ultimate determination of the Commission."

Second, as a matter of *statute,* it is clear that 28 U.S.C. §§ 1336, 2321-2325 vest original jurisdiction in the three-judge district court, whereas this Court's jurisdiction under 28 U.S.C. § 1253 is unmistakably appellate. This Court sits to review the judgment of the district court, not of the Commission, and in case of reversal it invariably remands to the district court for further proceedings. *United States* v. *Great Northern R. Co., supra.*[2]

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[2] The following additional authorities support the revesting of original jurisdiction in the lower federal courts to review additional questions arising out of administrative proceedings: *Federal Communications Commission* v. *WJR, Inc.,* 337 U.S. 265, 285 (1949); *United States* v. *Interstate Commerce Commission,* 337 U.S. 426, 444 (1949); *Texas Gas Corp.* v. *Shell Oil Co.,* 363 U.S. 263, 276-77 (1960); *Cory Corp.* v. *Sauber,* 363 U.S. 709, 712 (1960).

This then is one of the few cases where this Court has been asked directly to review administrative proceedings. On previous such occasions, the Court has regularly dismissed for want of jurisdiction. *E.g., Marbury* v. *Madison,* 1 Cranch 137 (1803); *Federal Radio Commission* v. *General Electric Co.,* 281 U.S. 464 (1930).

For these reasons, if probable jurisdiction is noted, it is respectfully submitted that the Court should explicitly limit its jurisdictional grant to exclude consideration of questions (a), (b), and (c) sought to be presented by the private appellants in No. 425.

2. The Questions of Detail Raised by Appellants to Give This Appeal a Color of Substantiality Are Not Ripe for Judgment at This Time.

Both the private appellants and the Commission express elaborate concern about the complex ramifications for I.C.C. merger proceedings supposedly created by the district court's requirement that the Commission couch its antitrust conclusions in terms of the geographic and service markets in which the probable competitive effects of the proposed merger "may be substantially to lessen competition" or "tend to create a monopoly." Thus the Commission complains of an imprecision of detail in the district court's opinion as to the extent of market investigation required, and sets forth a list of considerations allegedly contributing special complexity to the task of market definition in transportation mergers. (Jurisdictional Statement in No. 555, pp. 17-18.) The private appellants similarly bemoan the unworkability of the district court's opinion, claiming at one point that at least 7,260 "city pairs" might have to be considered

by the Commission in its search for geographic markets. (Jurisdictional Statement in No. 425, p. 28 & n. 26.)

It is necessary to state at the outset that these are highly abstract concerns. It may be possible "mathematically," as the private appellants say, to derive wholly unworkable implications from the district court's opinion. But the process of adjudication is fortunately not limited to the indiscriminate calculations of an abacus. That is why this Court has repeatedly reminded litigants that it sits to review judgments, not just opinions in the abstract. *United States* v. *American R. Express Co.*, 265 U.S. 425, 435 (1924); *Langnes* v. *Green*, 282 U.S. 531, 535-39 (1931); *Brown* v. *Allen*, 344 U.S. 443, 458-60 (1953). See generally *Securities & Exchange Commission* v. *Chenery Corp.*, 318 U.S. 80, 88 (1943); Fed. Rules Civ. Proc. 61. A judgment results from the impress of an opinion on the facts of record, and both must be looked at before concluding whether theoretically possible questions are in fact presented for decision.

Looking first at the opinion, it is important to remark what the district court did not decide. It did not hold that the antitrust laws are the measure of permissibility for railroad mergers. Quite the contrary, the district court stated explicitly on pages 12-13 of its opinion (242 F. Supp. at 21) that the Commission remains free to approve the merger if, after making adequate and properly supported findings on the resulting lessening of competition or tendency to create a monopoly, the Commission determines that the policy of the Transportation Act would otherwise be thwarted. The court's opinion carefully refrains from expressing any views as to whether the Commis-

sion should approve or disapprove the proposed merger or whether the Commission should impose or reject any particular conditions.

The district court was similarly careful to refrain from foreclosing consideration by the Commission of special factors that may affect the definition of markets in transportation merger proceedings. What the court laid down were general standards for appraising geographic markets[3] and service markets,[4] both proceeding from the basic statement of antitrust policy contained in this Court's *Philadelphia Bank* decision (itself, it should be noted, a regulated-service-industry case); namely, that a market for antitrust purposes is found "where, within the area of competitive overlap, the effect of the merger on competition will be direct and immediate."[5]

So long as it follows that principle and those general standards, the Commission remains entirely free to apply its transportation expertise to the process of actual market definition. If considerations arise bearing on the manageability of I.C.C. merger proceedings, the Commission may certainly take them into account in fashioning responsively rough-cut rules of admissibility. The Commission may in its judgment refuse for reasons of manageability to consider

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[3] "The geographic market selected must both correspond to the commercial realities of the industry and be economically significant." Opinion p. 17, 242 F. Supp. at 23.

[4] "The outer boundaries of a service market are to be determined by the reasonable interchangeability of use or the cross-elasticity of demand between the service itself and substitutes for it." Opinion p. 18, 242 F. Supp. at 23.

[5] *United States* v. *Philadelphia National Bank*, 374 U.S. 321, 357 (1963), quoted at opinion p. 17, 242 F. Supp. at 23.

the 7,260 "city pairs" suggested by the private appellants, or any other theoretical submarkets lacking sufficient economic significance.

Thus the imprecision of detail about which the Commission complains in the district court's opinion would seem more realistically to be a virtue, in that it permits the Commission—the expert body—to grapple with the practical considerations affecting railroad-merger market definition in the first instance.

The reason the district court could not be more detailed itself is that it was dealing with a vacuum. As will be developed more fully in part 3 hereafter, the Commission had made no effort whatsoever to discover or appraise the relevant markets in terms required by antitrust policy, even though the undisputed facts of record raised serious antitrust questions—rail monopoly in central and west-coast Florida, vertical foreclosure of extensive interchange business with the merged company's controlled subsidiary L & N—which the Commission by failing to appraise relevant markets left wholly unresolved. Taking the Florida question alone at this point, the Commission refused to consider whether this was a separate market, taking refuge repeatedly in generalities about competition in the Southeast as a whole and among all modes of transportation; the Commission made no effort to investigate the distinctive economic characteristics of the region, or the peculiarly rail-oriented nature of the principal commodities transported within it.

In this context it seems evident that questions of detail—the ease and workability of rules of market definition—cannot arise for judicial consideration until after the Commission itself has made an effort to apply the proper standards.

The adjudicative process advances of necessity by stages.[6] In *McLean Trucking Co.* v. *United States,* 321 U.S. 67 (1944), and *Minneapolis & St. L.R. Co.* v. *United States,* 361 U.S. 173 (1959), it was enough to decide that the antitrust laws had to be accommodated by the Commission with the transportation laws. Now it is time to decide, as the district court did, whether in passing on the antitrust aspects of a merger the Commission is free to adopt any criteria it wishes or must apply standards derived from the antitrust laws. At a later point in this litigation other, more difficult questions of detail may arise. But these questions, which at present are highly abstract, may never arise in this case in concrete form—either because the very obvious anticompetitive effects of the merger as in Florida will lead the Commission quite readily to invalidate or condition the merger to the satisfaction of all appellees, or because the Commission will follow up a satisfactory antitrust appraisal with a determination that the merger should nonetheless be approved. If questions of detail do arise, they will do so on a record and in a form that will permit their concrete adjudication; this Court's consideration should await that later day.

Leaving the Commission to work out the questions of detail will not only assist this Court in its ultimate review but actually should ease and expedite the Commission's proceedings in other pending rail-merger

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[6] Compare the early state-income-tax decisions, in which this Court passed first upon the naked question of state power to levy taxes on the net income from interstate business, and only later considered the reasonableness of state apportionment formulas. *United States Glue Co.* v. *Oak Creek,* 247 U.S. 321 (1918); *Underwood Typewriter Co.* v. *Chamberlain,* 254 U.S. 113 (1920).

cases.[7] A prompt summary affirmance will permit the Commission to go forward in these cases, whereas otherwise it would have to stay all rail-merger proceedings for the several months it would take to brief, argue, and decide the presently complex and abstract questions of detail raised by appellants. Furthermore, if the Commission is freed promptly to apply the district court's market standards to all pending mergers, it can be expected to develop in the process whatever differentiations of detail are dictated by the varying records placed before it. These too should be presented to this Court before it undertakes to bind the Commission's hand.

All of these considerations, rooted as they are in the effective administration of judicial business, support a conclusion that the questions of detail raised by appellants are not ripe for adjudication at this time. What remains is the simple question whether the court below correctly concluded, on the facts of record, that the Commission had failed properly to appraise and apply antitrust policy as required by this Court's *McLean* and *Minneapolis* decisions.

We think the correctness of the district court's judgment on this score is too plain to require extended argument.

3. The Judgment of the Court Below Was So Plainly Correct As Not to Call for Further Argument.

As pointed out by the court below, the Commission's finding that the reduction of competition caused by the merger would not be substantial was determined by reference to the Southeastern states as a whole and to

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[7] Some of these cases are listed on page 19 of the Commission's Jurisdictional Statement.

all modes of transportation including motor and water transportation. (Opinion pp. 16-17; 242 F. Supp. at 22-23.) In effect the Commission directed its appraisal at the broadest conceivable service and geographic markets in which the merging companies operate, and without regard to the major commodities carried by the two roads. This we contend was error, in that the Commission failed to follow the clear implications of this Court's decisions in *McLean Trucking Co.* v. *United States,* 321 U.S. 67 (1944), and *Minneapolis & St. L.R. Co.* v. *United States,* 361 U.S. 173 (1959); namely, that in considering a proposed merger the Commission must accommodate transportation policy with antitrust policy. Thus, it is completely inaccurate to state, as do the private appellants in their Jurisdictional Statement (p. 24), that there is no contention in this case that the Commission failed to comply with the standards prescribed in *McLean* and in *Minneapolis.* That was and is precisely the contention of Southern and it was also the contention of the Department of Justice and the FEC. It was the contention of those opposing the merger that the Commission failed to use proper standards in seeking to accommodate antitrust legislation to the Interstate Commerce Act as required by *McLean* and *Minneapolis.* While the Commission took the position that it was entitled to use some undefined Transportation Act standards to determine the antitrust policy that was to be accommodated (Commission brief below, pp. 52, 67-77), the parties opposing the merger took the position that antitrust criteria must be used to determine the antitrust policy which was then to be weighed with Transportation Act policy to make the required accommodation.

As a matter of simple economics, it seems abundantly clear that the anti-competitive effects of a merger can not be discovered or the extent thereof determined in a vacuum; it is only by relating the effect of a merger to relevant markets that a body can determine the existence of and the extent of anti-competitive effects. See *United States* v. *du Pont & Co.,* 353 U.S. 586, 593 (1957); *United States* v. *Bethlehem Steel Corp.,* 168 F. Supp. 576, 592 (S.D.N.Y. 1958). Any merger can be shown to have little or no effect on competition if relevant markets are ignored or if the merger is viewed from the standpoint of the broadest possible geographic and service markets. That is what the Commission did here and it was this error on which the court below rested its decision.

As a matter of law, moreover, it seems generally agreed in this case that in a merger proceeding the Commission is obliged to accommodate transportation policy with antitrust policy. *McLean Trucking Co.* v. *United States,* 321 U.S. 67, 86-87 (1944); *Minneapolis & St. L.R. Co.* v. *United States,* 361 U.S. 173 (1959). It is evident, furthermore, that the antitrust policy which is to be accommodated with transportation policy cannot be determined by reference to other statutes but must be drawn from the antitrust statutes and court decisions construing them; that is why in the *Minneapolis* case, *supra,* the Court said accommodation must be made with the "antitrust legislation." 361 U.S. at 186.

Once these established premises are accepted, it follows that as part of its responsibility to consider antitrust policy in a merger proceeding the Commission must make some appraisal of the economically significant markets in which effects on competition will be

felt. Nothing is more basic to the antitrust policy on mergers. Section 7 of the Clayton Act (15 U.S.C. § 18), the prime legislative source of antitrust merger policy, is phrased in terms of the "line of commerce" and "section of the country" in which competition may be lessened or monopoly produced. This Court's decisions under both the Clayton and Sherman Acts uniformily proceed by investigating the product or service markets and geographic market affected by a merger. *E.g., Brown Shoe Co.* v. *United States,* 370 U.S. 294 324 (1962); *United States* v. *Philadelphia National Bank,* 374 U.S. 321, 357 (1963); *United States* v. *First National Bank and Trust Co. of Lexington,* 376 U.S. 665, 667-68 (1964).[8] To neglect entirely such a market appraisal, as the Commission did, is necessarily to fail to consider or apply the antitrust policy on mergers and thus to render inadequate the resulting finding regarding a merger's effect on competition.

It needs only a brief recitation of the most salient facts of this merger to show why a proper appreciation of antitrust policy is essential to its consideration. The two railroads involved in this merger operate throughout a six-state area,[9] and with the L & N Railroad,

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[8] Since both the private appellants and the Commission complain in their Notices of Appeal of being required to measure markets by Section 7 of the Clayton Act and "the non-rail merger cases decided thereunder," it is worth noting that this Court in the *Lexington Bank* case relied on four earlier railroad-merger cases for the proposition that—apart of course from valid Commission approval—"where merging companies are major competitive factors *in a relevant market,* the elimination of significant competition between them, by merger or consolidation, itself constitutes a violation of § 1 of the Sherman Act." 376 U.S. at 671-72. (Emphasis added.)

[9] Virginia, North Carolina, South Carolina, Georgia, Alabama and Florida.

which will be controlled by the merged company, the combination would have approximately 54% of the total rail mileage, amounting to some sixteen thousand miles of rail, in an eight-state area.[10] (320 I.C.C. at 163.) The combination of these two railroads would result in a company with assets of over 1 billion dollars, operating revenues of some 340 million dollars a year and combined net income of about 32 million dollars annually. (320 I.C.C. at 253-65.) These are not feeble, failing companies; as the Commission found, "each railroad is currently in a relatively healthy condition." (320 I.C.C. at 146.) The hearing examiner also found that neither applicant was "in any foreseeable danger of financial difficulty."

The merger would eliminate competition between the two applicants on some 131 million dollars of carload freight revenues and would eliminate competition between them at some 121 common points in the six-state area considered by the Commission. (Ex. H-253; 320 I.C.C. at 164.)

About 54 million dollars of the presently competitive freight revenues of the two railroads would be entirely non-competitive with any other railroad after the merger. (320 I.C.C. at 163-64; Ex. H-253.) Furthermore, over 64% of the total carload traffic of the merged company would originate or terminate at points not served by any other railroad.[11]

Extensive as are the competitive effects of the merger throughout the southeast United States, the im-

[10] Virginia, North Carolina, South Carolina, Georgia, Alabama, Florida, Kentucky and Tennessee.

[11] Examiner's Report, reproduced in the private appellants' Jurisdictional Statement as Appendix E, pp. 104-05.

pact of the merger would be particularly concentrated and severe within the State of Florida. There the merged company would have some 81% of the total railroad mileage. (320 I.C.C. at 163.) In the entire central and west-coast market region of Florida, a market which contains over 40% of the state's population and is growing economically at a faster rate than Florida as a whole, faster than the six-state Southeastern area and faster than the United States as a whole,[12] all rail competition would be completely eliminated and an absolute rail monopoly would be created.

While appellants' Jurisdictional Statement (p. 7) and the Commission's Report seek to diminish the harsh effects of elimination of competition flowing from this merger by the bland statement that "only 17 communities outside of Florida" will be without rail competition after the merger, this cannot alter the far more important fact that there will be 59 communities within Florida which now enjoy rail competition but which will be left without any rail competition after the merger. (320 I.C.C. at 164.) The freight volume and dollar revenue to the two roads from traffic originating and terminating at these points, all of which are located in central and west-coast Florida, far exceeds the volume and revenue from all similar points in the Southeast combined. To be specific, of the freight and revenues on which presently existing competition in the Southeast will be altogether eliminated by the merger,

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[12] Ex. H-155, pp. 41, 54-61, 148-53.

roughly 83% arise from points in central and west-coast Florida.[13]

The traffic involved in these movements is predominantly rail traffic. Of the total rail and truck traffic moving in and out of the four most active points in central and west-coast Florida, which account for almost 40 million tons of originating and terminating traffic, truck competition has taken less than 20%.[14] The rails are dominant because the products carried are largely heavy loading, low value commodities. The nine basic commodities handled by the two roads and which account for 75% of their total tonnage are of this character.[15] For example, in 1959 the two roads handled over 20 million tons of phosphate rock, divided almost evenly between them, produced in central and west-coast Florida, and received revenues from

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[13] Computed from figures in the Examiner's Report, Appendix E, pp. 104-06. The Commission's statement that "the number of Florida points at which there has been no competition is about four times as great as the number of Florida points at which Seaboard and Coast Line have heretofore competed" cannot obscure the unmentioned fact that some 60 million dollars of revenue is derived by the two carriers from traffic originating or terminating at Florida points served only by the two carriers while some 47.5 million dollars of revenue is derived from the Florida points local to one or the other line. *Ibid.*

[14] The applicants' own figures (Ex. H-36, Vol. 2, Statement T) show that of the total rail and truck traffic moving in and out of the four most active points in central and west-coast Florida, railroads have retained the following percentages:

Mulberry	25 million tons—rails,	93.5%
Tampa	10.5 million tons—rails,	69.0%
Orlando	2.7 million tons—rails,	72.6%
St. Petersburg	1.5 million tons—rails,	90.3%

[15] Examiner's Report, Appendix E, pp. 12-13.

the carriage of this commodity totaling over 27 million dollars. (Ex. H-38.) The Commission conceded that this is "essentially a commodity normally handled by rail." (320 I.C.C. at 151.)

In the face of these undisputed facts the Commission in its opinion evaluated the competitive effect of the merger in the broadest possible geographic area, the broadest possible service area, and without regard to the commodities carried. The Commission, to support its finding that there would not be a substantial lessening of rail competition, at times used the six-state Southeastern area; it also used the Southern region as a whole, and at other times to minimize the loss of competition it cited statistics for the entire nation. The minor consideration given to the drastic effects of completely eliminating rail competition in central and west-coast Florida was reflected in the Commission's statement that the merger would simply replace the "duopoly" that has existed with a "monopoly." (320 I.C.C. at 165.) In its cursory consideration of the effect of the merger in this important central and west-coast Florida area, the Commission failed to appraise the impact of the elimination of competition on the carriage of commodities which are carried almost entirely by rail and which comprise the very commodities that account for the greater part of the revenues of the two applicants. And instead of focusing its attention on the dominant railroad mode of transportation for these commodities, the Commission diluted its appraisal by referring to general competition between railroads, trucks, airlines, pipe lines and water carriers —heedless of whether or to what extent these modes of transportation in fact operated in competition for

freight with the applicants in central and west-coast Florida.[16]

Considering the undisputed facts of record regarding the competitive effect of the merger in central and west-coast Florida, as well as the treatment given to these facts by the Commission, it seems undeniable that the Commission wholly failed to appraise the impact of the merger, as it was obligated to do by antitrust policy, in the most significant market—the one "where, within the area of competitive overlap, the effect of the merger on competition will be direct and immediate." *United States* v. *Philadelphia National Bank,* 374 U.S. 321, 357 (1963).

Apparently recognizing the inescapable economic significance of the rail competition in central and west-coast Florida that will be totally eliminated by the merger, the private appellants now state in conclusory fashion that the Commission did in fact make an extensive examination of "the special situation presented as to rail transportation in central and western Florida." (Jurisdictional Statement, p. 24.)[17] This con-

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[16] For example, see the Commission's discussion of the effect of the merger on the Tampa area (320 I.C.C. at 152-53), in which the Commission attributes a rate decline on phosphate rock to intermodal competition, even though the Commission had just conceded (at 151) that phosphate rock was "essentially a commodity normally handled by rail"; the balance of the Commission's freight statistics from the Tampa area make no reference to commodities carried in that area even though the Commission had just recognized (at 152) that the long-haul truck share of the market varies between such figures as 18 per cent for fertilizers to 92 per cent for paper mill products.

[17] The Commission itself makes no such claim, but rather concedes that it submerged rail competition in Florida within the category of intermodal competition throughout the Southeast. (Jurisdictional Statement, p. 4).

tention is, however, belied by the Commission's own report. For the Commission specifically refused to focus its appraisal of the merger's competitive consequences on the reduction of rail competition in Florida, stating that:

> "The impact of this merger, both good and bad, will be felt throughout the southern region and in evaluating its competitive advantages and disadvantages, we must consider the rail service provided by all rail carriers and, in fact, *the sum of all of the competitive transportation facilities that will remain available in this broad area.*" (320 I.C.C. at 166.) (Emphasis added.)

It was only by minimizing and ignoring the effects of the merger in central and west-coast Florida, and by assessing the competitive impact primarily with reference to all transportation modes in the Southern region or "in the Southeastern States viewed as a whole" (*ibid.*), that the Commission was able to reach its rather remarkable specific conclusions; namely, "that (1) the reduction of rail competition caused by the proposed merger will not be substantial; (2) ample competitive rail service will remain after the merger throughout most of the affected area, and (3) such reduction in competition as will result from the merger will have no appreciably injurious effect upon shippers and communities." (320 I.C.C. at 167.)

The private appellants' Jurisdictional Statement (pp. 8, 27) seeks to give the impression that the Commission imposed its protective condition requiring the merged company to establish, with Southern, joint rates for traffic through the Jacksonville gateway "with particular reference to the origination of traffic that would exist in central and western Florida" (p. 8). This

condition is discussed at 320 I.C.C. 181-83. Not one mention is made of traffic originating in central and western Florida. Indeed the condition itself (Condition 8, Appendix XI, 320 I.C.C. at 267) requires only that the merged company establish joint rates with Southern "*no higher* than the rates applicable over the lines of the merged company" (emphasis added). By any standards this does not establish competition between the merged company and other lines. Cf. *Northern Pacific R. Co.* v. *United States,* 356 U.S. 1, 11-12 (1958). We submit that the district court was entirely correct in its observation that:

> "To impose routing and gateway conditions outside the context of the relevant markets either fails to employ Clayton Act standards as relevant to the public interest or assumes that private interest is consistently compatible with the public interest." (Opinion p. 15, 242 F. Supp. at 22.)

The Commission's capacity to impose particular protective conditions on its approval of railroad mergers does in fact equip the Commission with a peculiarly fit instrument—and, we submit, a correlative responsibility—for careful market analysis. A condition cannot be effectively designed to protect against reduction of competition unless it is framed with particular market risks in mind. The Commission appears to have recognized the inter-relationship of protective conditions with antitrust policy, for it stated that:

> "Absent suitable protective conditions . . . . there is a distinct possibility that the proposed transaction would tend to lessen competition to an extent which would contravene the policy underlying the antitrust laws." (320 I.C.C. at 167.)

Yet the Commission's protective conditions were not related to the markets in which the impact of the

merger would be most immediate and direct. Rather the conditions were stated to be

> "the product of our exhaustive study of the competitive situation in the *Southeast.* We are convinced that these routing and gateway conditions will establish two balanced competitive systems *in that area* and will result in an increase rather than decrease in intramodal rail competition that will contribute to the present and future economic development of *this important section* of the Nation." (320 I.C.C. at 188.) (Emphasis added.)

This failure of the Commission to relate its conditions to the market most seriously affected by the merger was not for want of invitation. In the belief that the creation of a railroad monopoly in central and west-coast Florida could not be held to be "consistent with the public interest," Southern offered to reintroduce competition in this region if the merger was approved. It proposed that the Commission attach, as a condition to any approval, a requirement that the merged company for fair consideration transfer to Southern or another qualified, independent rail carrier a line of railroad from Jacksonville through Orlando to Tampa and other central and west-coast Florida points.[18] The Commission had adopted similar conditions requiring the transfer of rail lines or trackage rights where it considered that "the conditions will create more balanced competition among the several rail carriers in the southeastern seaboard area, and thus benefit the public generally." (320 I.C.C. at 184.) Approval of Southern's proposal would appear to have followed as of course from a like appraisal of the distinctive central and west-coast Florida market.

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[18] The applicants presently have three substantially parallel lines of railroad running from northeastern Florida into this area.

Despite what would seem to have been the obvious appropriateness of this proposal, however, the Commission rejected it as an "invasion of territory now adequately served by the applicants" which "would deprive the merged company of substantial revenues" and which could not be justified "in the absence of a public need for additional service." (320 I.C.C. at 187, 209.) We submit that this conclusion demonstrates a total failure to grasp, much less apply, antitrust policy, and that in particular the Commission's appraisal of public need is flawed by its failure to give separate consideration to the central and west-coast Florida market.

As indicated by the foregoing language in the Commission's Report, characterizing Southern's proposal for maintenance of competition in central and western Florida as a threatened "invasion of territory," the Commission's failure to define and appraise relevant geographic and service markets was symptomatic of a more general failure by the Commission to appreciate the requirements of antitrust policy.

While the district court did not pass on the contention of the plaintiffs below that the merger should be conditioned on divestiture by the merged company of the L & N Railroad, we believe the L & N situation similarly demonstrates the Commission's failure even to recognize antitrust problems in this case. Without such recognition it is, of course, impossible to make any meaningful accommodation of antitrust policy with the Transportation Act.

The undisputed evidence, indeed the evidence submitted by the applicants themselves, demonstrates that the ACL originally acquired control of the L & N in order that their "interchange business should be permanently secured," that the ACL has "favored L & N to the maximum extent consistent with the best inter-

ests of the Coast Line," that "all things being equal, it has, of course, been the policy of Coast Line to prefer the L & N routes," and that the merged company would continue this policy of the ACL and would favor the L & N whenever it was on a comparable basis with competition.[19] The interchange business thus affected is very substantial; in 1957 the SAL and ACL between them earned revenues of roughly $32 million through interchange with the L & N.[20]

At the very least, this evidence raised serious and significant antitrust problems. *United States* v. *du Pont & Co.*, 353 U.S. 586 (1957); *International Salt Co.* v. *United States*, 332 U.S. 392 (1947). Yet the Commission failed completely even to consider that antitrust policy was involved when it refused to condition approval of the merger on divestiture of the L & N. The Commission's altogether remarkable conclusion that the merged company would not indulge in "favoritism" for the L & N (320 I.C.C. at 88-89) can only be explained by its failure to recognize the antitrust condemnation of vertical arrangements that always prefer one competitor when conditions are equal. *E.g., International Salt, supra,* 332 U.S. at 397; *du Pont & Co., supra,* 353 U.S. at 607.[21]

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[19] Prepared Statement A, p. 31; Prepared Statement M, pp. 5-6, 13; Tr. 1286-87 (statements and testimony of ACL President and Vice President).

[20] Prepared Statement M, p. 11; Prepared Statement N, p. 3; Ex. H-53. The record does not show the amount of revenues accruing to the L & N on interline hauls transferred to it by the ACL and SAL, but it must be similarly substantial.

[21] It is noteworthy that, following its Report and Order in this case, the Commission on June 24, 1964 did condition approval of the Norfolk & Western merger on divestiture by the Pennsylvania Railroad of its controlling interest in the Norfolk & Western. *Norfolk & Western R. Co. and New York, Chicago & St. L.R. Co.—Merger,* 324 I.C.C. 1.

The preceding discussion should serve to set in context the clear correctness of the district court's holding that the Commission has failed to meet its obligation to accommodate antitrust policy with transportation policy. The district court phrased the Commission's obligation in terms drawn from Section 7 of the Clayton Act. The Commission, it held, must define the "line of commerce" and "section of the country" in which to appraise the probable competitive effects of the proposed merger and must determine whether the effect of the merger "may be substantially to lessen competition" or "tend to create a monopoly," before the Commission may proceed to determine whether the merger should in any event be approved on the ground of supervening transportation benefits. It is neither necessary nor appropriate at this point, however, for the Court to determine whether the Commission should be required to investigate each individual service or geographic submarket that might have to be appraised in an antitrust suit, or to make determinations of economic probability as fine as those committed to a court by Section 7. That question is highly abstract at this point and is unlikely to persist in this case, where even a very rough appraisal of the major relevant markets should lead the Commission to recognize the merger's anti-competitive effects and may well persuade the Commission either to invalidate the merger or to attach suitable remedial conditions to its approval. Furthermore, the requirement imposed by the district court, that the Commission appraise the relevant markets and make findings as to the extent of the loss of competition in these markets, will serve precisely to produce a record to illuminate this question for possible later appeal.

CONCLUSION

For the reasons stated, appellee Southern respectfully moves that the Court dismiss the portion of the appeal in No. 425 denominated as questions (a), (b), and (c) in the private appellants' Jurisdictional Statement, and as to the remaining question in both No. 425 and No. 555 that the Court affirm summarily. If the Court deems it advisable, it might wish to state in its order that the requirements laid down by the district court will assist judicial review of the merger and are approved provisionally for that purpose without prejudice to a later appeal after the Commission has sought to apply the requirements. In the interest of effective administration of judicial business, that appeal can appropriately await later presentation on a full record.

Respectfully submitted,

W. GRAHAM CLAYTOR, JR.
Box 1808
Washington 13, D. C.

JOHN K. MALLORY, JR.
ROLAND S. HOMET, JR.
224 Southern Building
Washington 5, D. C.
Attorneys for Appellee Southern Railway Co. et al.

Of Counsel:

WILLIAM D. MCLEAN
Washington, D. C.

JOHN B. MILLER
Savannah, Ga.

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